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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85935569
Applicant	Left Nut Brewing Company, Inc.
Applied for Mark	LEFT NUT BREWING CO.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of

Left Nut Brewing Company, Inc.

Serial No. 85/935569

Appeal Filed: March 9, 2015

Trademark: LEFT NUT BREWING CO.

Trademark Examining Attorney:

Ellen Awrich

Law Office 116

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**EX PARTE APPEAL**

**APPLICANT'S BRIEF**

In the matter of the petition for review of the final refusal of:

Applicant's Mark: LEFT NUT BREWING CO.

Application No. 85/935569

Applicant's Goods: Beers

International Class: 32

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## ALPHABETICAL INDEX OF CASES

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## DESCRIPTION OF THE RECORD AND RECITATION OF FACTS

Applicant filed a 1(b) application for the standard character mark “Left Nut Brewing Co.” in International Class 032 for use in connection with “Beers” on May 17, 2013. As such, during the prosecution of the application, evidence of Applicant’s use of the mark or evidence of the public’s reaction to the same was unavailable.

On September 5, 2013, the examining attorney issued the first Office Action requiring a disclaimer of the words “Brewing Co.,” identifying a possible 2(d) conflict with pending U.S. Application Serial No. 85912726, “NUT SAC,” for beer, and issuing a 2(a) refusal based on the assessment that “the applied-for mark consists of or includes immoral or scandalous matter. (citing Trademark Act Section 2(a), 15 U.S.C. §1052(a); *see* TMEP §1203.0) *See the Office Action dated September 5, 2013 (hereinafter “First Office Action”).*

Applicant filed a timely response to the first Office Action on March 4, 2014, responding to the 2(d) and 2(a) issues and providing the requested disclaimer. Applicant disputed the sufficiency of the evidence, including Urbandictionary.com, and the purported vulgarity of the mark (hereinafter “Response”).

The examining attorney issued a second Office Action on September 8, 2014, making final the 2(a) refusal, the previously raised 2(d) issue having been resolved by the abandonment of U.S. Application Serial No. 85912726 (hereinafter the “Final Office Action”).

The applicant timely filed a Request for Reconsideration contemporaneously with a Notice of Appeal on March 9, 2015.

After the Applicant filed its Notice of Appeal, the examining attorney submitted additional online evidence in support of the 2(a) refusal. As the examining attorney did not make such evidence part of the record or allow Applicant to respond to the same prior to the appeal, it is not being addressed by Applicant in this appeal brief, pursuant to 37 C.F.R. § 2.142.

## STATEMENT OF THE ISSUES

The issue is whether the PTO met its evidentiary burden to establish that Applicant's mark is scandalous and thus justify its refusal to register the mark pursuant to 2(a) of the Lanham Act.

## ARGUMENT

### I. **The Examining Attorney Impermissibly Burdened Applicant with Proving That the Mark Is Not Vulgar**

In the First Office Action, the examining attorney found "NUT" to be scandalous because it was noted as a "Vulgar" or "Vulgar Slang" term for "testicle" on the websites <http://education.yahoo.com>, <http://www.merriam-webster.com>, and <http://www.wordsmyth.net>. The examining attorney further stated that "definitions from Urban Dictionary.com reinforce that "LEFT NUT" refers to the left testicle, evidencing the vulgar meaning of NUT," citing <http://www.urbandictionary.com>.

As the examining attorney acknowledged:

Dictionary definitions alone may be sufficient to show that a term is vulgar *if* multiple dictionaries, including at least one standard dictionary, uniformly indicate that the term's meaning is vulgar, *and* the applicant's use of the term is clearly limited to that vulgar meaning. [emphasis supplied] *See In re Boulevard Entm't, Inc.*, 334 F.3d at 1341, 67 USPQ2d at 1478 (holding 1-800-JACK-OFF and JACK-OFF scandalous ***where all dictionary definitions of "jack-off" were considered vulgar***). [emphasis supplied] *See First Office Action*.

Thus, evidence from dictionaries is not *presumptively* sufficient but *may* be considered sufficient so long as the above-stated conditions are met. These conditions were not met in the examining attorney's review of the present application.

After reviewing Applicant's response, the examining attorney issued a Final Office action, which reiterated the previous refusal and evidence and attached additional definitions of "nut" from Wiktionary.com, *Webster's New World College Dictionary* and *The American Heritage® Dictionary of the*

*English Language* as found on <http://www.yourdictionary.com>. The additional evidence reiterated the previously submitted definitions of “nut.” At this time, the examining attorney reiterated the initial refusal and stated:

The applicant argues that the word “NUT” has other nonscandalous meanings. In this case, there is no evidence that the applicant uses “NUT” to mean anything other than the vulgar meaning. Furthermore, there is no requirement in Trademark Act Section 2(a) that a mark’s vulgar meaning be the “only relevant meaning--or even the most relevant meaning.” *In re Fox*, 702 F.3d 633, 638, 105 U.S.P.Q.2d 1247, 1250 (Fed. Cir. 2012). *See Final Office Action*.

In issuing the refusal, the examining attorney supported her determination by stating that “in this case, there is no evidence that the applicant uses NUT to mean anything other than the vulgar meaning,” asking that applicant respond “by submitting evidence and arguments in support of registration.” By stating that “there is no evidence that the applicant uses NUT to mean *anything other than* the vulgar meaning,” [emphasis supplied] the examining attorney neglected the fact that “[t]he burden of proving that the proposed mark is unregistrable under 15 U.S.C. § 1052(a) rests on the PTO” and not with the applicant. *Fox*, 702 F.3d at 637. The examining attorney thus expressly burdened the applicant with proving a non-vulgar use. Further, there is no need for the Applicant to prove “*other* non-scandalous meanings” as suggested by the examining attorney, which non-scandalous meanings abound in the definitions of record. *Id.*

In relying on the statement in *Fox* that the vulgar meaning need not be the “only relevant meaning--or even the most relevant meaning,” the examining attorney attempted to avoid the requirement set forth above in *Boulevard* that “the applicant’s use of the term [must be] clearly limited to that vulgar meaning” when establishing the sufficiency of dictionary evidence. *See Boulevard*, 334 F.3d at 1341. This a misreading of *Fox*. Acknowledging the existence of multiple meaning does not change the fact that the examining attorney must consider the applicant’s actual use of the mark as being vulgar prior to relying solely on dictionary evidence.

It is important to remember that the dictionary evidence cited in *Fox* presented no non-vulgar meaning of "cocksucker." *Fox*, 702 F.3d at 635. The alleged alternate meaning for that applicant could only be conjured by ignoring the commonplace, dictionary-defined unitary term "cocksucker" and considering the component words in an artificially separate context. In that case, the applicant tried to create a non-vulgar meaning in the product itself, but the dictionary evidence failed to support the non-vulgar meaning. In the present case, however, "Left" and "Nut" do not constitute a standard unitary term that has been artificially parsed. To the extent that the words relate to each other, they certainly do not rise to the level of a compound word such as "cocksucker." Whereas in both *Fox* and *Boulevard*, dictionary evidence was sufficient because of the singularity of the meaning of a vulgar term in the dictionary, this is not at all the case with "Left Nut."

Thus, the examining attorney falls short in demonstrating that the mark is shocking to the sense of truth, decency, propriety, disgraceful, offensive, disreputable or calling for condemnation, as measured by a substantial composite of the general public toward the term in light of marketplaces for the goods and contemporary social attitudes. *See In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1370-1371, 31 U.S.P.Q.2d 1923 (Fed. Cir. 1994).

In such cases, any doubts are to be resolved "in favor of applicant and [the PTO should] pass the mark for publication with the knowledge that if a group does find the mark to be scandalous or disparaging, an opposition proceeding can be brought and a more complete record can be established." *In re Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990).

## **II. The Word "Nut" Is Not Scandalous Per Se**

As discussed above, each of the cases cited by the examining attorney is least inconclusive if not entirely inapposite. Both "jack-off" and "cocksucker" were definable terms with no legitimate non-vulgar meaning. Though the term "nut" is universally listed in dictionaries, it is not uniformly noted as having a "vulgar" meaning. *See applicant's Request for Reconsideration*. Moreover, the meaning is ambiguous in the present case not only in reference to the above-referenced alternate definitions but also because the mark is not yet in use by the applicant, and the nature and extent of its use has yet to be determined and



demonstrated. As in the present instance, "[w]here the meaning of a proposed mark is ambiguous, mere dictionary evidence of a possible vulgar meaning may be insufficient to establish the vulgarity of the mark." *Fox*, 702 F.3d at 635 (quoting *Mavety* 33 F.3d at 1373-74). Here, dictionary evidence does not support the contention "that the mark[ ] as used by [the applicant] in connection with the [products] described in [the] application" invokes a vulgar meaning to a substantial composite of the general public" *Id.* (quoting *Boulevard*, 334 F.3d at 1341). Neither is it "one of the famous "seven dirty words" found by the Supreme Court to be generally "indecent." *Fox*, 702 F.3d at n.1 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 738-41, 751, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978)).

It is not possible for the examining attorney to make an *a priori* determination of the vulgarity of "Nut" when *Boulevard* and *Fox* require that "the applicant's use of the term [be] clearly *limited* to that vulgar meaning" as presented with "uniformity" in dictionaries prior to relying solely on dictionary evidence. Moreover, since applicant's application in this case is a Section 1(b) application, the examining attorney can do no more than speculate as to the *multiplicity* of meanings that applicant may invoke.

The Federal Circuit has expressed on numerous occasions that when the examining attorney relies on dictionary evidence and yet it is unclear whether the mark is vulgar, the mark should proceed to publication. *See Mavety*, 33 F.3d at 1374 (finding that the PTO does not meet its burden with dictionary evidence alone, and that the proper mechanism for developing a more complete record is to allow the mark to publish, thereby enabling groups who may find the mark scandalous the opportunity to initiate an opposition proceeding and more fully develop the record).

The Federal Circuit has noted that publishing the application "avoids the risk of pre-judging public attitudes toward a proposed registration based on *ad hoc* responses by government officials, while at the same time affording the affected public an opportunity to effectively participate in the question of whether the registration is proper." *Ritchie v. Simpson*, 170 F.3d 1092, 1094, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999).

Applicant respectfully asserts that it has offered credible evidence, in both its *Response* and *Request for Reconsideration*, showing that the mark is ambiguous and not clearly vulgar; therefore, it is proper for

the mark to proceed to publication under the line of case law following the Federal Circuit's preference in *Mavety*.

**III. A 2(a) Refusal of Commonplace Word with a Slang Meaning is Arbitrary Without Assessing Use in Context of Goods**

While the *Boulevard* court dismissed the appellant's equal protection argument, it acknowledged that a claim would exist if "the agency acted pursuant to some impermissible or arbitrary standard." *Boulevard*, 334 F.3d at 1343. The Board has acknowledged that the "guidelines are somewhat vague and that a determination that a mark is scandalous is necessarily a highly subjective one." *In re Over Our Heads Inc.*, 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990). And it is this dangerously wide spectrum of subjectivity that makes the approval of ambiguous applications all the more important.

The many instances of nut-related marks to which the applicant has previously drawn the examining attorney's attention and which pervade the registry, indicate a standard that is not in keeping with the standard applied to the Applicant and suggests the arbitrariness of the present refusal to register.

Demonstrably, the mere existence of a multiple meanings in the minds of hypothetical consumers cannot eliminate wholesale the use of a word when the use itself is not overtly vulgar. Setting a precedent that would undermine an applicant's ability to use such a commonplace word as "nut" has far-reaching consequences for future applicants. As an example, the following trademarks untenable for future users:

- MY HUSBAND'S NUTS, Registration No. 2,984,922 (registrant sells almonds online)
- MY MOM'S NUTS, U.S. Trademark Application Serial No. 85,894,817 (filed Apr. 4, 2013)(applicant selling nuts online received office action for likelihood of confusion, but not for scandalousness)

*See screenshots attached to applicant's Response.*

As the Board stated as far back as 1978, "One of a certain cast of mind may perhaps see evil wherever the eye may light or in whatever may fall on the ear. We are unwilling to assign base motives to an applicant who propounds a plausible explanation for a trademark." *In Re Leo Quan Inc.*, 200 U.S.P.Q.

(BNA) H 370 (T.T.A.B. 1978). The board in that case dismissed as insignificant the "colloquialisms of a particular segment of the society of the age," in determining whether "BADASS" was registrable. *Id.* In keeping with this line of reasoning, there is no reason why an applicant should not be able to federally protect a trademark that contains the word "nut," notwithstanding the possibility that certain people might snicker.

Despite the principle that prior registrations are not binding upon the examining attorney or the Board, it is clear that an important purpose of the registry is to inform entrepreneurs as to what marks are likely registrable: "Entrepreneurs... who plan to promote and to sell a new product under a fanciful mark, *should be able to rely on a search of the trademark registry* and their own knowledge of whether the mark has been used so that what may be substantial expenditures of money promoting the mark will not be wasted." *Natural Footwear Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383, 1395, 225 U.S.P.Q. 1104, 1111-12 (3d Cir.1985) (citing *Weiner King, Inc. v. The Wiener King Corp.*, 615 F.2d 512, 523-24, 204 U.S.P.Q. 820, 830-31 (C.C.P.A. 1980)).

Further *Mavety* characterizes the registrability of earlier marks as a barometer of social mores, explaining that, "[t]o appreciate the extreme changes in social mores over time, one need only glance at a historical survey of Board decisions regarding refusals to register marks containing particular words deemed scandalous" *Mavety*, 33 F.3d at n.18.

In light of this issue of subjectivity, the Board reversed a finding that "BIG PECKER BRAND" was "a scandalous mark as applied to T-shirts" *In Re Hershey*, 6 U.S.P.Q.2d 1470 (T.T.A.B. 1988). If the examining attorney is considering this precedent, it would suggest that the examining attorney believes "nut" to be somehow less ambiguous, less open to multiple interpretations, and more offensive than "pecker." Such a result certainly supports the arbitrariness of the examination process.

#### **IV. Use of the Word "Left" in Conjunction with "Nut" Is Not Per Se Vulgar**

No standard dictionary evidence was presented by the examining attorney pertaining to the phrase "left nut," nor has the Applicant encountered any such definable term. The two-word phrase "left nut" has apparently, therefore, not entered the language to the extent that it is so recognizable as to warrant inclusion

in a dictionary in the same manner as, "Jack-Off," or "Cocksucker," the inclusion of which composite terms in dictionaries examined in those cases may arguably be taken to indicate their recognition by a substantial portion of the community.

Moreover, the mere presence of a particular word as a component of a slang idiom, without more, does not definitively fix the meaning of that element. The examining attorney draws attention to the term "Sex rod," a term that the Board has noted, when the two constituent words are used in conjunction with one another, cannot but suggest the same meaning. *Bos. Red Sox Baseball Club Ltd. v. Sherman*, 88 U.S.P.Q.2d 1581,1588 (T.T.A.B. 2008). In the present case, however, "Left," unlike "sex" is largely descriptive, and so ambiguous as to fail to fix any particular meaning when yoked with "Nut" in the way that "sex" determines the meaning of "rod" when the two are paired. In fact, other colloquial uses of "left nut" are not only possible but equally observable. While Applicant maintains that Urban Dictionary is not a credible source of definitions, Applicant feels compelled to point out that to the extent Urban Dictionary sheds any light *at all* on the matter, it shows that the definition of "left nut" includes two (2) entries defining "left nut" as the passenger seat of a car behind the driver, and one (1) entry defining the phrase as "a leftwing radical." *See attachments to First Office Action; see also Request for Reconsideration.*

#### **V. Urban Dictionary Evidence is Insufficient to Establish Dictionary Evidence**

The examining attorney cites the website Urban Dictionary.com, as the only evidence that the phrase "left nut" has a vulgar meaning, but, as stated above, even this website did not uniformly indicate that "Left Nut" was vulgar. The Federal Circuit has stated that dictionaries are appropriate references for Section 2(a) determinations because dictionary definitions "represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of the individual views of either the examining attorney or the dictionary editors." *See Boulevard*, 334 F.3d at 1340. Urban Dictionary does not distill the collective understanding of the community with respect to language. By contrast, it is user-populated and popularity-driven, reflecting the views of an *infinitesimal* portion of the population that does not even remotely amount to a "substantial composite."

In the recent decision *In re Star Belly Stitcher, Inc.*, the T.T.A.B. has expressly recognized the unreliability of the "user-generated" content of UrbanDictionary.com. *See In re Star Belly Stitcher, Inc.* 107 U.S.P.Q.2d 2059 n.3 (T.T.A.B. 2013). This dictionary-in-name-only does not represent the "effort to distill the collective understanding of the community with respect to language" that initially justified the Court's notice of dictionary evidence. *Boulevard* 334 F.3d at 1340. While not dismissing *Urban Dictionary* altogether, the Board expressly stated that *Urban Dictionary* evidence is to be given limited consideration "given that anyone can submit or edit the definitions." *Id.* Further, the T.T.A.B. recognized "that while a definition in Urban Dictionary may be indicative of what a term means to a composite of the general public, ...[it is] less sure that it represents the meaning to a substantial composite, given that just one person can submit a proposed definition." *Id.* In fact, the definition relied upon by the examining attorney was reportedly submitted by "Your Mom," who submitted a total of two "definitions." *See First Office Action; see also Request for Reconsideration.*

Often, the top-ranking definitions on Urban Dictionary become so with merely a couple hundred votes. For example, Your Mom's definition of "left nut," as cited by the examining attorney, has 216 thumbs up votes. *See First Office Action.* Interestingly, it also has 30 thumbs down votes. In a country of approximately **317,000,000** people (according to census.gov) and with the number of English-speaking Internet users likely doubling that number (according to interenetworkstats.com), 216 voters is a truly insignificant number that does not even come remotely close to serving the function of a standard dictionary, which is to distill the common knowledge. In addition, new definitions are added every day.

Applicant has repeatedly rebutted the reliability of the definitions used in Urban Dictionary, showing that no standard dictionary includes "left nut" and presenting several irredeemably unreliable definitions from the website to illustrate the patent ridiculousness of relying on it as reference material. After spending even a few minutes on Urban Dictionary looking up common words, it becomes apparent that the top-ranking definition for any given word rise to the top due to often vulgar humor, not accuracy. That is the website's very *raison d'être*. The top-ranking definition of "desk" in the so-called Urban Dictionary: "a nice, stable, flat surface used for sex." *See attachment to Response.* Yet the PTO has not

rejected more than five hundred (500) marks including “desk,” even such ambiguous marks as “desk candy” (Serial No. 86128450), “Deskhop” (Serial No. 86052747), “Deskmate” (Reg. No. 4539463), all marks which Your Mom (the Urban Dictionary lexicographer cited by the examining attorney) would likely define in ribald terms. Another example is “pencil,” the top-ranking definition of which on Urban Dictionary is: “Male that comes into chat as \*number.number inches\* and loves all the ladies. He's also known to only say 1 or 2 words to most of them before trying to get them in bed and bang them!” *See attachment to Response*. There are presently in excess of one hundred twenty-five (125) live “pencil” applications, either registered or in process, including such approved and registered marks as “Pencil Pull” (Reg. No. 4250268) and “Black Pencil” (Reg. No. 2556871). Clearly it is absurd to suggest that all marks containing “desk” or “pencil” should be scrutinized for immoral or scandalous potential by anyone except Urban Dictionary aficionados, for all common words are vulgar in the Urban Dictionary, and the more creative, strange, and vulgar the definition of those words, the more likely they are to draw user attention, acclaim, and further augmentation. Urban Dictionary does not distill the common knowledge: it creates *new content*. Rather than documenting accepted usage as one would expect a “dictionary” to do, it reflects a prurient, minority entertainment interest that is wholly inappropriate as guide for the enforcement of the Lanham Act.

The Court's description in *In Re Leo Quan*, of the inadequate evidence provided by “colloquialisms of a particular segment of the society of the age,” truly embodies the puerile activity represented by the Urban Dictionary, which is populated with crude definition after crude definition purely for the entertainment of individuals whose online pseudonyms give a clear glimpse into their mentality. To the extent that Urban dictionary can be used as a reference, the definition of “left nut” is not unanimous in any sense. As such, even on her own terms, the examining attorney fails to establish the sort of clear-cut uniformity of dictionary evidence necessary to reject the application without further evidence. Accordingly, Urban Dictionary, the only source cited by the examining attorney that has a vulgar definition for “left nut,” is not an appropriate source for a Section 2(a) refusal under the Federal Circuit's stated policy in *Boulevard*. On the contrary, to the extent that the examining attorney wishes to assert that Urban Dictionary has any value at all, it is to show that contemporary attitudes are very permissive of crude humor.

## **VI. There Is No Vulgar Meaning in Context with the Goods**

The mark must be considered in connection with the relevant market as applied to only the claimed goods and in light of contemporary attitudes, and if, having considered the foregoing, the mark has a ***clearly vulgar application, in context***, then a Section 2(a) refusal may be appropriate, even if a non-vulgar application of the mark also exists. *See Mavety*, 33 F.3d at 1373; *and See Boulevard*, 334 F.3d at 1341. By contrast, if it is unclear whether the mark, taken in context, has a vulgar or non-vulgar application, then definition evidence alone is insufficient to show that the mark is vulgar. *See Mavety*, 33 F.3d at 1373. Respectfully, the examining attorney does not show that the mark ***in context*** and ***as applied*** has a ***clearly vulgar meaning to a substantial composite of the general public***, but rather, simply concludes that such a meaning must exist to a substantial composite due to the mere existence of an alternative definition of "NUT" as "testis." In fact, the examining attorney does not even discuss the mark as applied to the claimed goods at all, except to say that "there is no evidence that the applicant uses NUT to mean anything other than the vulgar meaning."

The examining attorney's own research reveals that the common definitions of "nut" are indeed not vulgar, but rather commonly invoke the notion of a dry fruit, a head, or a crazy or eccentric person. *See examining attorney's attachments to the First Office Action*. According to these resources, the common meaning of NUT is a nutty flavor, the head, or a foolish, silly, or eccentric person. While Applicant agrees that the vulgar meaning need not be the only relevant meaning or even the most relevant meaning of the word, the meaning must be taken in the context of the relevant market as applied only to the claimed goods. When so considering the mark's meaning in connection with the claimed goods, beer, the mark is at best ambiguous, and therefore, dictionary evidence alone does not satisfy the PTO's burden.

Related to the primary definition of "NUT," a dry fruit or seed, the term "nuttness" is often used to describe the flavor of certain types of food and beverage. Dictionary.com defines "nuttness" as "nutlike, especially in flavor." *See attachment to Response*. The term "nuttness" is often used to describe a flavor in beer. *See excerpt from the Beer Judge Certification Program Style Guidelines for Beer, Mead, & Cider*

*attached to Response*. Further, in connection with a product such as beer, the word “nut” could easily connote additional meanings, such as “fanatic,” “buff,” or “connoisseur.”

With regard to the term "left," Dictionary.com defines "left" as the individuals advocating for liberal reform, and defines "left wing" as the part of a political organization advocating a liberal or radical position. *See attachment to Response*. Craft breweries have an independent spirit in a highly competitive market that requires brewers to push the frontier. Applicant's mark "left nut" invokes the sense of liberal and eccentric brewing techniques, the nutty flavors of beer, and the fanatical following craft brewing attracts.

As the case law discussed above demonstrates, a mark purported to have both vulgar and non-vulgar meanings is not disqualified merely on the existence of an alternative vulgar meaning. On the contrary, the PTO's burden of demonstrating vulgarity requires that the mark be clearly vulgar when considered in connection with the applied-for goods or services, and the PTO has failed to carry its burden in this instance.

## **VII. Anatomical References Are Not Per Se Vulgar**

To the extent that someone may perceive the word “nut” as a slang reference to “testis,” it bears mentioning that there is no standard for determining the relative vulgarity of body parts. Ultimately, the examining attorney finds that the mere alternative meaning of "nut" as "testis" amounts to vulgarity, however, anatomical references alone are not vulgar. For example, the mark "Have Some Guts, Check Your Nuts," for silicon wristbands is not vulgar. Neither is "Save the Ta-Tas" in connection with breast cancer awareness. Even a little more edgy, "Rockin the Tatas" for shirts is not vulgar. *See attachments to Response*. Anatomical references are fairly commonplace and are not automatically vulgar. Even the Federal Circuit in *Mavety* found “black buttocks” not to be a vulgar association for the mark “tail” where both the anatomical reference and the sexual reference were applicable. *See Mavety*, 33 F.3d at 1373. This is not to say that anatomical references are never vulgar as applied to the claimed goods, but again, in the case at bar, there is no demonstrable connection between beer and "left nut" that makes the mark clearly vulgar.



It is important to consider that the most vulgar definition for NUT that exists is an anatomical reference, but in *Mavety* a similar anatomical reference was adjudged to be the *non*-vulgar meaning. *See Id.* As such, applicant's mark clearly has less potential to be perceived as vulgar than the mark "tail" for pornographic magazines. In further contrast, if Applicant's mark is taken in context with the goods, it is unclear how "left testis" has anything to do with beer at all. The Applicant's mark is more ambiguous and less vulgar in any sense than the trademark examined in *Mavety*, and due to this ambiguity of the mark in context, a Section 2(a) refusal is inappropriate based on dictionary evidence alone and applicant's mark should be permitted to proceed to publication.

### SUMMARY

The examining attorney's decision is contrary to PTO procedure, which has been refined by a significant body of case law and board decisions interpreting the proper issuance of 2(a) refusal. Contrary to such methodology, which strives to avoid the arbitrary application of the law by mitigating the influence of subjectivity, the examining attorney has refused registration of a 1(b) trademark application due to the inclusion of the word "nut" in a mark proposed for use connection with "beers." Even while acknowledging the many non-vulgar definitions of "nut," several of which are relevant to the craft beer industry, the examining attorney has expressly and impermissibly burdened the Applicant with proving non-vulgar use, when in fact the examining attorney must herself prove vulgar use by Applicant. Despite the fact that the word "left" has no inherent vulgarity, and that the term "left nut" is not defined as vulgar (or defined at all) by any credible source, the examining attorney has adhered with singularity to Your Mom's definition of "Left Nut" appearing on [Urbandictionary.com](http://Urbandictionary.com)—this in spite of several other meanings appearing on the same web site, with equal authority. Applicant has established that the meaning of "nut," or even "left nut" as a phrase, is ambiguous at worst, and that the issue of vulgarity is largely speculative, particularly given that, because the application was based on intent-to-use, there was no available evidence that the mark was actually used in a vulgar manner. In support of refusal, the examining attorney has cited cases that are not analogous to the Applicant's application and argues, essentially, that since "jack-off," "cocksucker," and

“sex rod” are uniformly vulgar, somehow “left nut” is so too. Applicant, on the contrary, has established that the analysis of the word “tail” in *Mavety* offers the most appropriate legal analogy, that the PTO has not met its burden of proof, and that the mark should proceed to publication.

Dated this twenty-sixth day (26<sup>th</sup>) of March, 2015.

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